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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 936

THE RASER TANNING COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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THE RASER TANNING COMPANY,

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States.

The Raser Tanning Company respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

In this judgment The Court of Appeals affirmed the Decision of the National Labor Relations Board which found your petitioner guilty of unfair labor practices. (Appendix, p. 41, *infra.*)

OPINIONS BELOW.

The opinion of the Court of Appeals and the opinion of the National Labor Relations Board are set out in the Transcript of Record, and appear in the appendix hereto at pages 34 and 27.

JURISDICTION.

The judgment of the Court of Appeals was made and entered March 29, 1960. Petitioner finally filed his Stay of Mandate which was granted on *April 14, 1960*. The jurisdiction of this Court is envoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Can the respondent deny the petitioner access to pre-trial statements of witnesses taken by respondent's representatives when production of such statements was duly demanded?

2. When the Trial Examiner demonstrates bias and open hostility to petitioner, and credits all of respondent's evidence even where such testimony is proven false, has petitioner been afforded a fair hearing and due process of law?

3. Is the requirement of substantial evidence on the record considered as a whole satisfied where respondent has failed to show by any evidence an anti-union background of petitioner and where the only evidence to support the respondent's findings are controverted statements of respondent's witnesses who are seeking back pay awards and who gave undeniable deliberate false testimony?

STATUTES INVOLVED.

Your petitioner was cited in violation of unfair labor practices affecting commerce; more specifically, the following provision of the National Labor Relations Act, as amended (61 Stat. 136):

Section 2(6) (29 U. S. C. 152):

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among

the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

Section 7 (29 U. S. C 157):

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a)(1) (29 U. S. C. 158(a)(1)):

"(a) It shall be an unfair labor practice for an employee:

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

Section 8(a)(3) (29 U. S. C. 158(a)(3)):

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to re-

quire as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

STATEMENT OF THE CASE.

The petitioner, The Raser Tanning Company, an Ohio corporation, is engaged in the business of processing hides at its tannery in Ashtabula, Ohio. This Ashtabula, Ohio plant is petitioner's only place of business, and petitioner has conducted its business at this location for some sixty (60) years.

Petitioner's factory is divided into various departments with each department performing a separate and distinct operation in the procedure of tanning a raw hide into finished leather.

The hides are received in steel drums by railroad car from meat processing plants. These hides, which have been salted at the meat plants, are removed from the drums by petitioner's employees in the Hide Room, which is the starting department in petitioner's factory. After the hides are removed from the drums, the Hide House employees trim the head, legs and tail portions from the hides and load the hides on lift trucks for transfer to the next department, which is known as the Beam Room. In addition to the above duties, the Hide House employees also perform duties in the coal yard to stoke the furnaces for heat and steam and perform such other incidental duties as are required in the nonproductive operations of the tannery.

In the Beam Room, the employees soak the hides in pits to remove the salt, run the hides through de-fleshing machines, which remove the small amount of flesh not removed at the packing house, soak the hides in lime pits, run the hides through machines which remove the hair, and finally soak the hides in a sulphuric acid solution.

In the Tan Yard the hides are soaked in the tanning chemicals and placed in wringing machines which remove any excess tan liquid.

From the Tan Yard the hides go to the Splitting Room where machines slice the hides into the thickness desired.

The next department is the Retan Department where the tanning of the split hides is completed.

From the Retan the hides then go to the Buffing and Shipping Departments which complete the processing.

In each of these departments the employees generally work as a team of two (2) as the hides are heavy and difficult to handle.

With the exception of foremen, chemists and certain machine operators, petitioner's employees are unskilled

as their duties are those of lifting the hides to and from the machines and vats.

The processing of a hide from its start in the Hide House through the various departments until its arrival in the Shipping Department takes approximately one month. (Record, page 152a.)

When it becomes necessary to curtail production, no new hides or a decreased number of hides are put in to soak in the Beam Room. The rest of the departments will continue to operate, however, at the previous production rate until the decreased flow of hides reaches their department. (Record, 151a, 152a.)

All new employees start their employment in the Hide House, which serves as a reservoir of workmen. From the Hide House employees are transferred to the departments where help is needed, and conversely, are transferred back to the Hide House when there are excess workmen in any department. (Record, 144a, 147a.)

When there are excess workmen in the Hide House and no work for them to perform, these excess workmen are terminated. (Record, 147a.)

When the work force is reduced, petitioner's long established practice is to terminate employees on the basis of seniority and ability to do the work. (Record, 168a, 169a.)

With the exception of foremen and a few skilled machine operators, the turnover of employees at petitioner's plant is very high. The only skill required is the capacity and willingness to do the heavy physical labor involved in lifting the heavy hides from the vats and machines. The vast majority of the employees are transients who only work long enough to acquire sufficient money to move to another locale. The employees, therefore, leave petitioner's employ after relatively short periods of employment and some leave to work at seasonal jobs

or at less arduous employment, and then often return from seasonal undertakings to petitioner's employ. As a result such employees do not develop any particular skills that would make them more valuable than new employees, nor do they demonstrate generally a continuity of employment and responsibility of attitude that makes them preferable to rehire over a new employee who might apply with no previous experience in such work.

The petitioner is a family-owned and controlled corporation with the officers often working alongside the employees in the various departments. As a result of working with the employees, a friendly personal relationship has always existed between the members of management and the employees, on a first-name basis. Personal and family problems have long been frequent topics of discussion between petitioner's officers and the employees while at work, with advice and opinions freely interchanged.

On *April 16*, 1957, the charging union, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, hereinafter called "Union," seeking to organize petitioner's employees, simultaneously filed a petition for certification as bargaining agent for petitioner's employees and a charge against petitioner alleging the wrongful discharge of two employees on April 12, 1957. (Record, 225a.)

A representative election, to which petitioner consented, was held on May 1, 1957, under the auspices of the respondent. Seventy-one (71) of petitioner's employees voted against union representation and forty-four (44) voted for such union representation.

Thereafter the Union filed three (3) amended charges alleging the wrongful discharge of some *twelve (12) employees* for union activities. (Record, 226a, 227a, 228a.)

On *February 20, 1958*, respondent issued a complaint alleging the wrongful discharge of the seven (7) employees

named in the Union's Third Amended Charge (Record, 228a). The complaint also alleged that the petitioner kept union meetings under surveillance and threatened and interrogated its employees. None of the charges filed prior to the complaint complained of this alleged activity, which purportedly *occurred* some *ten (10) months previous to the filing of the complaint.* (Record, 229a, 231a inclusive.)

Petitioner's answer, filed *February 2, 1958*, stated that of the seven (7) employees alleged to have been wrongfully terminated, two (2) were discharged for cause, three (3) were terminated for economic reasons in accordance with company policy when its work force is reduced, and that the remaining two (2) voluntarily quit the petitioner's employ. Petitioner's answer also denied the fact and occurrence of the threats, surveillance and interrogations alleged in the complaint. (Record, 232a, 233a.)

The hearing before the trial examiner, C. W. Wittemore, was held in Ashtabula, Ohio, on April 8th, 9th and 10th of 1958. At the time of the hearing petitioner moved to dismiss the allegations of the complaint concerning the alleged acts of surveillance, interrogations and threats, as such were not supported by a timely charge. (Record, 234a.) The trial examiner denied this motion (Record, 7a), and the hearing went forward.

Petitioner issued a subpoena for pre-trial statements of the witnesses against it which was quashed and denied by the examiner and the respondent. (Record, 9a, 10a, 235a, 236a.)

On April 27, 1958, the trial examiner issued his intermediate report and recommendations which sustained the allegations of the complaint in their entirety. (Record, 252a, 265a inclusive.)

On July 8, 1958, petitioner's exceptions to the intermediate report were filed, together with its request for oral argument. (Record, 274a.)

On December 22, 1958, respondent *adopted* the recommendations and conclusions in the intermediate report of the trial examiner and *summarily denied petitioner's request* for oral argument. (Record, 274a.)

On January 15, 1959, this petition for review was docketed in the Court of Appeals, Sixth Circuit.

Petitioner asked that Court review and set aside the decision and order of the respondent, which order requires petitioner to re-employ and award back pay to seven (7) terminated employees, and to set aside the finding that petitioner has engaged in the practices of surveillance of a union meeting place and of threatening and interrogating its employees so as to discourage their union membership.

The trial examiner selected by the respondent sustained each and every allegation of the complaint against petitioner. The examiner's conclusions were reached by discrediting without exception all the testimony and evidence of the petitioner and crediting without exception the testimony of respondent's witnesses, even where such testimony was proven false.

The examiner's conduct of the hearing, his remarks into the record, his unfounded inferences, his history of advocacy, and his twisting of the evidence demonstrate unequivocally his bias and prejudice against petitioner and his partisan attitude to the union cause. Such conduct denied petitioner a fair hearing and destroyed any weight which could be accorded to his credibility findings and to the respondent's decision and order which adopted the examiner's recommendations and conclusions.

Petitioner was denied the right of production of pretrial statements of witnesses against it by the trial examiner and by the respondent.

The incidents charged in the complaint against petitioner are confined to the interval of a single month, April 12, 1957 to May 13, 1957. Respondent has not shown or

even alleged anti-union background or animus on the part of petitioner.

The Court of Appeals, Sixth Circuit, affirmed the decision of the Board on March 29, 1960.

REASONS FOR GRANTING THE WRIT.

A Writ of Certiorari should be granted in this matter because your petitioner has been denied due process of law and because the Court of Appeals, Sixth Circuit, and the Trial Examiner have failed to apply the law as decided by this Court in *Jencks vs. United States*, 353 U. S. 657 (1957) which, if applied, would cause this matter to be remanded to the regional director for further proceedings.

ARGUMENT.

POINT ONE.

Can the respondent deny the petitioner access to pre-trial statements of witnesses taken by respondent's representatives when production of such statements was duly demanded?

Your petitioner contends this question should be answered "NO."

At the time of the hearing, the petitioner demanded and issued a subpoena for the pre-trial statements of witnesses against it in the possession of General Counsel. (Record, 7a to 16a inclusive.) This subpoena was further amplified by a telegram to General Counsel in Washington, D. C., pursuant to the then existing rules of respondent. (Record, 97a; Respondent's Exhibit 1-a, 235a.) The trial examiner quashed petitioner's subpoena (Record, 98a) and the respondent denied petitioner's request. (Rec-

ord, 236a; Respondent's Exhibit 1-b, 236a.) Exceptions were taken.

The controlling case in this issue is *Jencks vs. United States*, 353 U. S. 657 (1957). There this Court said,

> "We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."

What this Court has decided in that case is basically that justice should be done and that a defense should not be allowed to fail when it, in fact, would succeed if certain documents were shown to the defendant. It is a situation of placing all the cards on the table, and to permit one litigant the privilege of withholding certain documents from the defense is, in effect, permitting him to use the court as a tool for injustice if those documents might cause his case to fail.

The Court of Appeals, Second Circuit, in *N. L. R. B. vs. Adhesive Products Corporation*, 258 F. 2d 403, decided on July 3, 1958, that the principles of the *Jencks* decision, *supra*, were applicable to administrative hearings as well as criminal trials. This point is readily admitted in the Court of Appeals decision in the case before us. (See Appendix page 36, *infra*.)

And further, the Board in *RA-Rich Manufacturing Corp.*, 121 N. L. R. B., No. 90, decided on August 28, 1958, stated:

> "The Board now holds, in conformity with the decision of the Court of Appeals for the Second Circuit in *Adhesive Products*, that the holding of the *Jencks*

case applies to Board proceedings and affords parties thereto, upon proper demand, the right to production for purposes of cross-examination of pre-trial statements made by witnesses who have already testified in such proceedings."

The inspection of such affidavits of the respondent's witnesses was of importance to the petitioner in the instant matter. Petitioner has heretofore shown that certain of the respondent's witnesses gave undeniably false testimony. With the crucial question in the proceedings being that of credibility of witnesses, further inconsistency between the testimony and pre-trial statements is of the utmost importance to petitioner. Denial thereof is prejudicial and a denial of due process to your petitioner.

In further support it is noted that since this case the Board has amended Section 102.118 of its regulations by adding:

"Provided, after a witness called by the General Counsel, has testified in a hearing upon a complaint under section 10 (C) of the act the respondent may move for the production of any statement of such witness in possession of the General Counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner, if the General Counsel declines to furnish the statement, the testimony of the witness shall be stricken."

Thus, it is evident that be it case law or on enacted regulation there is no question that both the courts and the Board deem a request by a respondent to view pre-trial statements to be a reasonably necessary part of a defense, and one that should be granted. Human experience has taught us all that one lie of necessity leads to many more.

POINT TWO.

When the Trial Examiner demonstrates bias and open hostility to petitioner, and credits all of respondent's evidence even where such testimony is proven false, has petitioner been offered a fair hearing and due process of law?

The petitioner contends this question should be answered "NO."

The petitioner in its exceptions to the Intermediate Report to the trial examiner, C. W. Wittemore, strenuously objected to the examiner's bias and partisan attitude. The respondent in its Decision and Order failed to even comment on this aspect of the case, although the respondent and the Courts in the past have declined to accept this trial examiner's findings and conclusions on the basis of his bias and prejudice against the employer on many occasions.

In *Better Monkey Grip Co.*, 113 N. L. R. B. 938, at page 939 the Board states in commenting on the trial examiner, C. W. Wittemore:

> "After carefully examining the entire record, we are of the opinion that certain aspects of the proceedings were such that it at least appears Respondent did not have a complete and impartial hearing. Thus, in cross-examining witnesses the Trial Examiner appeared to assume the role of an advocate in attempting to impeach their prior testimony. Throughout the hearings, and particularly during the presentation of the Respondent's case in chief, the Trial Examiner, in attempting to expedite the hearing, cut off lines of inquiry and limited the response of witnesses to such an extent that the development of the case may have been hampered. Also some of the gratuitous comments of the Trial Examiner would have better been left unsaid * * *"

And at page 941:

> "As the Board stated in *Indianapolis Glove Company* (88 N. L. R. B. 986) we feel that it is essential not only to avoid actual partiality and prejudgment and intimidation of witnesses in conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal."

The United States Court of Appeals for the Eighth Circuit in *United Packinghouse Workers (Wilson and Company) vs. N. L. R. B.*, 210 F. 2d 325; certiorari denied 348 U. S. 822, 99 Law. Ed. 648, 75 S. Ct. 36, in commenting upon trial examiner C. W. Wittemore stated at page 329:

> "True the trial examiner found the evidence sufficient to sustain that charge. He did so by discrediting positive testimony in many instances and by crediting negative testimony of the employee. The uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive testimony offered on behalf of the employer regardless of the fact that the evidence of the employer, was corroborated in most instances by the surrounding facts and circumstances, convinces us of his bias and hostility. Parties to these hearings are entitled to a fair, unbiased and impartial hearing. *N. L. R. B. v. Phelps*, 5 Cir., 130 F. 2d 562; *N. L. R. B. v. Acme-Evans Co.*, 7 Cir., 130 F. 2d 477; *N. L. R. B. v. A. Sartorius & Co., Inc.*, 2 Cir., 140 F. 2d 203. In *N. L. R. B. v. Phelps*, supra, it is among other things said: (136 F. 2d 563):
>
> "* * * a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an

administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains through the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand.' "

The United States Court of Appeals for the Fifth Circuit in *Miami Coca-Cola Bottling Company*, 5 Cir., 222 F. 2d 341, at page 345 in commenting on the same C. W. Wittemore held:

"All such evidence cannot be casually eliminated by the simple expedient of 'discrediting' respondent's witnesses. We cannot escape the conclusion that the trial examiner, in uniformly crediting the General Counsel's evidence and discrediting all of respondent's, whether or not the latter was contradicted or corroborated", ("It may be noted that a reading of the record reflects a similar degree of one-sided uniformity in the examiner's rulings on the propriety of questions and upon objections to the admissibility of evidence) exhibited that degree of bias which deprives his credibility findings of the weight usually accorded them. *N. L. R. B. vs. National Paper Co., supra* (5 Cir. 216 F. 2d 859); *Local No. 3, United Packinghouse Workers of America, CIO vs. N. L. R. B.* 8 Cir., 210 F. 2d 325."

Other cases involving trial examiner C. W. Wittemore are: *N. L. R. B. vs. National Paper Co.*, 5 Cir., 216 F. 2d 859; *Western Cartridge Company v. N. L. R. B.*, 2 Cir., 138

F. 2d 551; and *Communication Workers Union, Local 4372 (Ohio Telephone Company)* 120 N. L. R. B. No. 96 (May 1, 1958).

The record in the instant case is replete with showings of the trial examiner, C. W. Wittemore's extreme bias and prejudice against petitioner, and his allowance of every latitude to General Counsel while restricting petitioner.

Employee Edward Reed, who was originally subpoenaed by General Counsel to appear for respondents, was not called by General Counsel and petitioner called employee Reed as one of its witnesses. When Reed denied the fact and occurrence of the testimony of respondent's witnesses, the trial examiner in a rage took over the cross examination of Reed as follows (Record, 112a to 116a inclusive):

The cross-examination of respondent's witness Reed by Mr. Griesbach:

"Q. And, did you tell him that the day after that meeting Loren Swedenborg, Bob Swedenborg and Charles Smith all questioned you as to whether you were at that meeting?

A. No.

Q. You didn't tell him that?

A. No.

Q. And, did you tell him that you told the Swedenborgs and Charles Smith that you were not there and that Loren then said that there wasn't any use to lie about it they knew you were there and that they watched us?

A. No.

Q. Do you remember that?

A. No.

Q. You don't remember that?

A. No.

Q. And, did you tell the Labor Board man that in that discussion Loren pulled out a list and that you

saw on it the names of people that you had seen at the meeting the day before including Trent's name?

A. No.

Q. You didn't tell him that at all?

A. No.

Trial Examiner: Answer the question.

The Witness: I said no.

By Mr. Griesbach:

Q. You are sure of that?

A. Sure I'm sure.

Q. You took an oath here to tell the truth here this afternoon?

Mr. Dill: I object to this, your Honor. Everybody has taken an oath to tell the truth.

Trial Examiner: Have you?

Mr. Dill: Yes.

Trial Examiner: When?

Mr. Dill: When I took—

Trial Examiner: Let's not get too general about this that everybody has taken the oath.

Mr. Dill: I mean those that have testified.

Trial Examiner: This is quite justifiable under the circumstances, it seems to me. I think that I would be inclined to remind the witness of that myself.

Mr. Dill: On what grounds, your Honor?

Trial Examiner: If General Counsel here I assume is representative of the Government has a statement from this man which directly contrary—

Mr. Griesbach: It is not a statement, your Honor.

Mr. Dill: I would like to have the statement if that is what he is questioning from.

Trial Examiner: Alright.

Mr. Dill: May I have a look at that statement?

Trial Examiner: Well, perhaps I—

Mr. Griesbach: You may not look at it. Nobody is offering it—

Mr. Dill: Then I say he can't use a statement or infer that he has one and hold it in his hand as though he is reading from a statement if I am not permitted to see it.

Trial Examiner: Well, he can look at anything he wants. He is not asking him what is on that statement.

Mr. Dill: You are assuming that he has the statement.

Trial Examiner: I apparently was in error since he is informing me that it is not. So, I will withdraw my statement.

By Mr. Griesbach:

Q. Mr. Trent declined to make a signed statement on the occasion—excuse me. Mr. Reed the gentleman in the witness chair. Is that not correct, Mr. Reed, when you were discussing the matter with Mr. Gieser? Didn't he ask you to make an affidavit?

A. Yes.

Q. And, what did you tell him?

A. I told him no.

Q. And, why didn't you want to make one?

A. Because I had no reason to make one.

Q. Is that what you told Mr. Gieser?

A. Exactly.

Q. What do you mean you had no reason to make one?

A. What reason should I have to make one?

Q. I'm asking the question, Mr. Reed, if you will please give me your answer? Do you know what the question was?

A. Yes.

Q. Then, please give me the answer?

A. Well, I had no reason whatsoever to make out a statement at that time.

Q. Didn't you know any of the circumstances surrounding this situation that we have occupied with the last few days?

Mr. Dill: Object to that. He has testified here that he knew about them and that they didn't happen.

Trial Examiner: Well, let me interrupt at this point.

You say that when the government agent asked you questions you declined to sign the statement to him?

The Witness: I refused to sign one.

Trial Examiner: Did you refuse to come up here for the company and testify for the company?

The Witness: No.

Trial Examiner: Now, what is the difference between the government man asking you to testify and tell the truth and the company asking you to take the stand?

Mr. Dill: I object, your Honor. There is no assumption here that he was asked to tell the truth. If you would let me go into it on direct, I would have pointed out that he was asked to tell things that were not true and that is why he refused to sign this so-called statement. Mr. Griesbach—I mean, Mr. Gieser was trying to put words in his mouth.

Trial Examiner: That is not his answer to the question that was put to him on this matter whatever you have in mind.

Mr. Dill: That is what he so informed us."

The trial examiner at this juncture clearly shows his firmly entrenched belief that the government witnesses testify and tell the truth and the company witnesses just take the stand.

When the petitioner sought to show that the Board's representatives largely fabricated the case against petitioner by intensive questioning, suggestion and slanted and false affidavits from petitioner's employees, the trial examiner barred this field of proof as follows (Record 103a, 104a, 105a):

"Mr. Dill: Well, Mr. Reed, were you questioned by Mr. Gieser of the National Labor Relations Board?

The Witness: Yes.

By Mr. Dill:

Q. And, how long a period did that questioning take place?

A. I'd say about an hour.

Q. Where did that happen?

A. At my house.

Q. And, when he questioned you what did he say to you and what did you say to him?

Trial Examiner: What is the issue about his being questioned by the Board's Representative?

Mr. Dill: Well, I want to bring out, your Honor, what happened with respect to his—

Trial Examiner: Well, it is wholly immaterial in the case and I rule it out. Now let's get down to something that is material."

but permitted General Counsel to go into the same matter. (Record, 111a, 112a.)

The trial examiner chided the General Counsel when in cross-examination of petitioner's witness, Robert Swedenborg, facts were elicited by General Counsel that tended to prove that the Barlow brothers quit. (Record, 202a, 203a.)

Trial Examiner: Mr. Griesbach, in all seriousness, I would like to ask you now which one of your witnesses you wish me to believe. This was not gone into on direct examination. Now you have your own witnesses who said they didn't quit and on a new subject matter now this witness said that they did quit. Now which one do you expect me to believe.

Mr. Griesbach: I think that the manner of answering of this witness leaves little choice as to the credibility of the witnesses who are in conflict.

Mr. Dill: I consider that remark entirely out of order and uncalled for.

Trial Examiner: Weren't you satisfied with your own witnesses on undisputed testimony?

Mr. Griesbach: Yes, sir. Very much so.

Trial Examiner: It is now disputed testimony if I may call it to your attention and was not before.

Mr. Dill: Mrs. Moore testified to it too, your Honor.

Trial Examiner: She merely testified as to what he said and what they asked. She didn't testify about any of these other matters."

The General Counsel was afforded complete latitude in direct and cross examination and the liberty of going into matters which if at a later time did not become material they would be stricken, while petitioner was limited to denials of previous testimony against it and was not permitted to go into matters without first indicating their materiality. (Record 57a, 58a.)

The trial examiner in his Intermediate Report when faced with proof that petitioner's witness Loren Swedenborg was out of the city during the time respondent's witnesses, James Trent, Lemon Fields, Junior Coleman and Herman Fleming attributed statements and interrogations to him, concluded that these incidents did take place, but since Loren Swedenborg was out of town on April 12, 1957, that the five witnesses were mistaken as to the date, and that the incidents occurred on April 15, 1957, a date when Loren Swedenborg was at the petitioner's factory. (Record, 259a.) The April 15th date placed by the trial examiner is an impossible inference as April 12, 1957, was Lemon Fields' last day of employment.

The trial examiner when finding that Kenneth Barlow credibly testified as to a conversation with Alvin Swedenborg two or three days before the election on May 1, 1957,

held that Kenneth Barlow's dates were only approximate so that Alvin Swedenborg's absence from the city from April 28, 1957, on, would not affect the credibility of Kenneth Barlow's testimony. (Record, 255a.)

In each and every instance where the evidence of petitioner conflicted with the evidence offered by respondent, the trial examiner discredited petitioner's evidence. The trial examiner's findings and conclusions are based on the expedient of discrediting petitioner's evidence, and the Decision and Order of the Board which adopted such an examiner's findings is entitled to no weight.

POINT THREE.

Is the requirement of substantial evidence on the record considered as a whole satisfied where respondent has failed to show by any evidence an anti-union background of petitioner and where the only evidence to support the respondent's findings are controverted statements of respondent's witnesses who are seeking back pay awards and who gave undeniable deliberate false testimony?

Petitioner contends that it should be answered, NO.

The respondent has failed to sustain its burden of showing violations of the Act by substantial evidence.

The United States Court of Appeals for the Eighth Circuit in *Osceola Co. Co-Op Cream Ass'n. vs. N. L. R. B.*, 8 Cir., 251 F. 2d 61 (January 3, 1958), in defining the role of the Federal Courts stated:

> "*Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474; 71 S. Ct. 456, is the controlling case governing the scope of review to be given to National Labor Relations Board decisions. There, the Supreme Court, in discussing the legislative history of the scope of review provisions of the Act, calls attention to public and

congressional dissatisfaction with the 'abdication' with which some courts granted enforcement of the Board's orders under the Wagner Act, which act provided that the Board's findings were conclusive if supported by evidence. The Court points out that the present standard broadens the responsibility of the Courts in the review of Board decisions, and indicates that no definite formula for judicial review can be laid down but that much must be left to the sound judicial discretion of the reviewing Court. The Court does state (340 U. S. at page 490, 71 S. Ct. at page 466):

> 'We conclude, therefore, that the Administrative Procedure Act and the Taft Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals. The Board's findings are entitled to respect; but they must none the less be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.' "

See also: *N. L. R. B. v. Ford Radio & Mica Corp.*, 2 Cir., 258 F. 2d 457.

Of the nine (9) witnesses for the respondent upon whose testimony the Decision and Order of the Board is based, it has heretofore been shown in this brief that:

A. Seven (7) have a financial interest in their testimony. (James Trent, Kenneth Barlow, Jack Barlow, Lemon Fields, Junior Coleman, John Miller, Adell Metcalfe).

B. Of the seven (7) who are seeking back pay awards, five (5) gave testimony proven to be false. (James Trent, Junior Coleman, Lemon Fields, Kenneth Barlow, Herman Fleming)

C. One (Adell Metcalfe) is a many-times convicted felon and seeks a back pay award.

D. One (Willie Payne) still in petitioner's employ, testified that no one threatened or promised him anything (Record, 41a) and that of the forty-five members of the Union, the vast majority are still working for petitioner. (Record, 37a, 39a, 40a.)

The trial examiner credited, without exception, all of the testimony of these nine (9) witnesses where such testimony tended to show violations of the Act. The examiner discredited all of the testimony of petitioner's witnesses where the fact and occurrence of the incidents charged was denied or explained.

Of petitioner's witnesses, the record does not disclose nor does there exist a single instance of inconsistent testimony and such testimony is substantiated by the surrounding facts and circumstances.

The findings, conclusions and recommendations of the trial examiner which were adopted by the respondent are based upon the complete acceptance of the testimony of respondent's witnesses and the inferences derived from a single back-and-forth automobile ride by petitioner's officers in front of the church where a union meeting happened to be in progress. (Record, 176a, 177a, 188a, 189a, 190a.)

This church where the union meetings were held is on the direct route to Loren Swedenborg's home (Record, 177a, 178a, 187a) and petitioner's officers pass this church many times when going to Loren Swedenborg's home. On the single occasion charged, petitioner's officers, when seeing some of their fellows there, turned around for another look out of curiosity, but did not learn that it was a union meeting until the following week. (Record, 177a, 189a, 190a.)

The National Labor Relations Board in *B. F. Graybeal & K. W. Graybeal, DBA C. R. Graybeal & Sons*, 114 N. L. R. B. 700, No. 111, October 26, 1955, decided that a violation of the Act is not shown by the isolated fact that a foreman stopped at a store on the public highway where a union meeting was in progress and engaged in conversation with an employee even if curiosity impelled the foreman to stop and inquire about the assembly of employees.

The trial examiner and the respondent also draw unwarranted inferences from the fact that petitioner's witnesses testified that they made up a list of employees they thought would vote for Union representation at the forthcoming election (Record, 183a, 184a, 185a). The inference that this list of possible Union representation votes was a discriminatory vehicle is dispelled by the fact that of the forty-five (45) Union members only seven (7) were terminated and the circumstances of these seven (7) terminations have been heretofore established for reasons wholly apart from union membership and/or activity (Record 190a, 191a). The list of possible Union members was not solicited, but developed when the employees voluntarily told petitioner's officers that they had joined the Union. (Record, 183a, 184a, 185a, 186a.) As stated heretofore, petitioner's officers work with the men in the plant and the forthcoming election was a topic of general

discussion. (Record, 181.) At this juncture, it should be noted that the overwhelming majority of the employees voted against Union representation and the Union did not file a single charge contesting the validity of the election.

The test of substantial evidence on the record considered as a whole in order to sustain a Decision and Order of the respondent Board cannot be deemed met when the testimony tending to support the Decision and Order is from witnesses who have perjured themselves and from a witness whose admitted criminal record precludes acceptance of his controverted testimony.

CONCLUSION.

It is respectfully submitted that your petitioner has been denied a fair hearing, has been denied due process of law, and that the Decision and Order of the respondent is not sustained by any substantial evidence, and that by reason thereof your petitioner requests this Court to grant a Writ of Certiorari to the Court of Appeals, Sixth Circuit, in this matter so that this Court shall hear this matter on its merits.

Respectfully submitted,

M. REESE DILL,

Attorney for Petitioner.

MERKEL, CAMPBELL, DILL & ZETZER,

Of Counsel.

APPENDIX.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

On May 27, 1958, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report, a supporting brief, and a request for oral argument.[1]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions,[2] the brief, and the entire record in the case and here-

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[1] Because in our opinion the record, exceptions, and brief adequately set forth the issues and the positions of the parties, this request is hereby denied.

[2] In its exceptions, the Respondent contends, in substance, that the record made at the hearing is defective, in that it does not set forth certain alleged testimony by the Respondent's witnesses denying other testimony on the basis of which the Trial Examiner found that the Respondent violated Section 8(a)(1) and 8(a)(3) of the Act. Certain of these alleged denials do, in fact, appear in the record, and we shall not disturb the Trial Examiner's failure to credit them. As to such of these alleged denials as do not appear in the record, we shall not at this time attempt to determine whether such testimony was actually given, but shall instead not adopt the following findings of the Trial Examiner which are affected by such alleged denials: (1) that on the morning of the election herein the Respondent's vice-president, Loren Swedenborg, asked employee Adell Metcalfe about the union meeting the night before and told him that if he was

(Continued on next page)

by adopts the findings, conclusions, and recommendations of the Trial Examiner with the modifications and additions noted herein.[3]

(Continued from preceding page)

not going to vote for Respondent, he would "rather" he did not vote at all, and, finally, that if he did go to the polls, he would know that he had voted for the Union; (2) that soon after union organization began, Secretary Smith and Vice-president Swedenborg told employee Kenneth Barlow they did not want him to talk to any of the men in the plant, and that, when he asked "why," Smith replied, "You know why"; (3) that the day after the first union meeting Superintendent Robert Swedenborg asked employee Lemon Fields about Reverend Williams and "this union junk" and also asked him if he had signed a card; and (4) that on the morning of the election Secretary Smith asked employee Junior Coleman if he had attended the union meeting the night before and that Coleman admitted the fact and saw his name on a list carried by Smith.

[3] We note an inadvertent error in the Intermediate Report, which, however, does not affect the validity of the Trial Examiner's findings and conclusions. In Section III C. of the Intermediate Report, the Trial Examiner stated that he did not credit *Secretary Smith's* denial of a threat to, and interrogation of, employee Kenneth Barlow. However, it is clear from the context that reference was intended to Superintendent Robert Swedenborg rather than Smith. Furthermore, for reasons indicated below, we do not adopt the following findings of the Trial Examiner, and do not rely on them in finding that the Respondent violated the Act: (1) that the Respondent's vice-president, Loren Swedenborg, did not deny employee Payne's testimony that on or about April 19, 1957, Swedenborg remarked to Payne, in substance, that he knew Payne had been late for a union meeting on the previous day; (2) that Foreman Stehura's testimony that he and Superintendent Robert Swedenborg decided to lay off employee Lemon Fields for "insufficiency of work" is *inconsistent* with the claim in the answer that Fields was "discharged for incompetence and inability to do the work required"; (3) that the service of the first and second amended charges herein showed that employees Trent, Metcalfe, and Coleman were seeking reemployment; and (4) that on or about April 15, 1957, a number of management officials gathered around employee Reed, that he was asked who had attended a union meeting, and that he divulged the names of certain employees. We do not adopt (1) because it is not supported by the record, and we do not adopt (2) and (3) because, in our opinion, they represent conclusions or inferences which are not warranted by the evidence. As to (4), we do not rely on this alleged interrogation because, in making this finding, the Trial Examiner

(Continued on next page)

1. For reasons stated in the Intermediate Report, we find no merit in the Respondent's contention that employees Lemon Fields and John Miller were discharged for deficiencies in their work, and that employees Kenneth and Jack Barlow were not discharged but voluntarily quit. We agree with the Trial Examiner that all these employees were discharged for union activity, in violation of Section 8(a)(3) and (1) of the Act.

2. The Trial Examiner also found that the Respondent discharged employees James Trent, Adell Metcalfe, and Junior Coleman because of their union activity, in violation of Section 8(a)(3) and (1) of the Act. Trent and Metcalfe were discharged on May 2, 1957, the day after the election herein, and Coleman on May 10. These discharges occurred only a few weeks after the discharge of Fields[1] and Miller and about the same time as the discharges of the Barlows.

The Respondent has asserted a special defense with respect to these 3 employees, contending that they were not discharged for union activity but were laid off in order of seniority for economic reasons. In support of this contention, the Respondent cites evidence tending to show a progressive decline in its production and work force from

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(Continued from preceding page.)

predicated it, at least in part, on an alleged admission by Reed which does not appear in the record. In this connection, the Respondent contends in substance that at the hearing the Trial Examiner improperly denied its request for the production of an alleged pre-trial statement by Reed to a Board agent (Cf. *Jencks v. United States*, 353 U. S. 657). However, as Reed was the Respondent's own witness and as the Respondent was not seeking the alleged statement for use in cross-examining Reed, we do not deem the principle of the *Jencks* case applicable here. *Ra-Rich Manufacturing Corporation*, 121 NLRB No. 90. Moreover, as already stated, we are not finding any violation of the Act on the basis of the alleged interrogation of Reed.

[1] Fields and Miller were discharged on April 12 and the Barlows on May 9.

about January 1, 1957, to about June 1, 1957. However, the record indicates that there was during that period a high rate of voluntary quits among the Respondent's employees, and there is no substantial evidence that any employees were laid off or otherwise involuntarily terminated during this period other than the discharges involved there.[5] All 3 were experienced employees, having served the Respondent from about 3 to 5 years. With the possible exception of Metcalfe, none of them was told that he was being laid off for economic reasons. Moreover, it is clear that the Respondent was aware of their union activity. *Metcalfe*, as found by the Trial Examiner, a few days after the first union meeting on April 11 was interrogated by Secretary Smith as to his union activity, and, when Metcalfe admitted signing a card for the Union, Smith declared: "I am through with you." As is further found by the Trial Examiner, on the morning of the election Superintendent Robert Swedenborg interrogated Metcalfe about his voting intentions, and after threats of reprisal if the employees voted for the Union, warned Metcalfe that if he appeared at the polls Swedenborg would know how he voted. Metcalfe, nevertheless, appeared at the polls and did vote. *Coleman* was one of the original organizers of the Union, and active in its affairs, and he was one of its official observers at the election. When, on May 10, Secretary Smith told Coleman that he had been laid off, Coleman asked the reason for his termination. Smith answered only: "You know why. I'm sorry." *Trent* was a prominent proponent of the Union and one of its observers at the election. On May 1, 1957, Superintendent Robert Swedenborg

[5] There is some equivocal evidence that another employee, Jonathan Sturgill, was laid off shortly after Trent's discharge. However, we deem this evidence insufficient to establish the date on which, or the circumstances under which, Sturgill's employment ceased.

told employee Kenneth Barlow that he had a list of names of the employees who had attended the union meeting the night before and that Barlow's and Trent's names were on the top of the list.

In these circumstances, we find no merit in the Respondent's contention that these 3 employees were laid off for economic reasons and find that they were discharged because of union activity, in violation of Section 8(a)(3) and (1) of the Act.

ORDER.

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, The Raser Tanning Company, Ashtabula, Ohio, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Amalgmated Meat Cutters & Butcher Workmen of North America, AFL-CIO, or in any other labor organization of its employees, by discharging or refusing to reinstate employees, or in any other manner discriminating in regard to their hire or

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[1] The charges alleged that the Respondent had violated Section 8(a)(3) and (1) of the Act in that the Respondent discriminatorily discharged certain employees and in that by these and "other acts and conduct" the Respondent had coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act. At the hearing, the Respondent moved to dismiss paragraph 6 of the complaint (which alleges surveillance, interrogation, and threats, in violation of Section 8(a)(1) of the Act) on the ground, in substance, that it is not supported by the charges. In its exceptions and brief to the Board, the Respondent contends that the Trial Examiner failed to rule on this motion in his Intermediate Report. However, the record discloses that the Trial Examiner denied the motion at the hearing. We concur in this denial. *National Labor Relations Board v. Kohler Company*, 220 F. 2d 3 at 5, 6, and 7 (C. A. 7).

tenure of employment or any term or condition of employment;

(b) Engaging in surveillance of union meeting places, threatening employees with reprisals or promising benefits to discourage union membership and activity, and interrogating employees as to their union membership in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the Act;

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to Lemon Fields, John Miller, James Trent, Adell Metcalfe, Kenneth Barlow, Jack Barlow, and Junior Coleman, to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the section of the Intermediate Report entitled "The remedy";

(b) Preserve and make available to the Board or its agents upon request, for examination and copying, all pay-

roll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order;

(c) Post at its Ashtabula, Ohio, plant copies of the notice attached hereto and marked "Appendix."[7] Copies of said notice, to be furnished by the Regional Director for the Eighth Region shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof in conspicuous places, including all places where notices to employees are customarily posted, and maintained by it for a period of sixty (60) consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Eighth Region, in writing, within ten (10) days from the date of this Order, as to the steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. Dec. 22, 1958.

BOYD LEEDOM, *Chairman,*
STEPHEN S. BEAN, *Member,*
JOHN H. FANNING, *Member,*
National Labor Relations Board.

(SEAL)

[7] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed March 29, 1960.)

Before: MARTIN, CECIL and WEICK, Circuit Judges.

CECIL, Circuit Judge. The Raser Tanning Company has petitioned this Court to review the proceedings of the National Labor Relations Board by which it found the petitioner guilty of unfair labor practices and to set aside its order of December 22, 1958. The Board filed an answer in which it requested enforcement of its order against the petitioner.

The hearing of the complaint filed before the Board was conducted by a Trial Examiner who made an intermediate report containing findings of fact and conclusions of law. Exceptions to the report filed on behalf of the Company were heard by a three member panel of the Board.

The Board adopted the findings, conclusions and recommendations of the Trial Examiner with some modifications and additions as noted in its decision. It found that the petitioner discharged seven employees in violation of Section 8 (A) (3) and (1) of the Act.

The petitioner requested an oral hearing before the entire Board. This was not allowed and it was referred to a three member panel in accordance with Section 153 (b) Title 29 U. S. C. Such reference is discretionary with the Board and no error was committed.

One of the claims of the petitioner is that the respondent erroneously denied it access to pre-trial statements of witnesses taken by respondent's representatives.

Counsel for the petitioner made the following motion at the beginning of the hearing before the Trial Examiner: "At this time, your Honor, the Respondent moves for the—an order requiring the General Counsel and the Charging Union to provide to the Respondent the copies

of all affidavits, statements and other matters which either the Charging Union or the General Counsel have obtained from any witnesses involved in this proceeding, in order that the Respondent may be apprised of the details of these so-called Charges, and thus be in a position to prepare its defense properly." (p. 15 Official Report of Proceedings.)

Subpoenas were issued with the following request: "We are requesting on the face of the subpoenas for copies of all statements, affidavits and other written matter developed by or received by the Charging Union or the General Counsel with respect to all items of the Complaint and all of the material during the investigation leading up to the issuance of the Complaint, including such statements and affidavits as led to the issuance of, and investigation of the first, second and third amended Charges, and, covering all witnesses, all employees of the Raser Tanning Company in any manner involved in this proceeding, including, executives of the company and subordinate employees." (p. 17 Official Report of Proceedings.)

There is no authority for issuing subpoenas containing such comprehensive demand. It would be impossible to comply with such a request short of turning over to the petitioner the files of all investigative agents, the files of counsel for the Board and any memorandums made by any one who ever had anything to do with the case. The request is so broad that it is meaningless and the Trial Examiner was fully justified in quashing the subpoenas.

If there is any merit at all to the claim it lies in the request contained in the motion for production of pre-trial statements of witnesses.

In *National Labor Relations Board v. Adhesive Products Corporation*, 258 F. 2d 403, C. A. 2, the court held that a written statement or memorandum which a witness

had made prior to his testifying and from which he had refreshed his recollection should have been produced for the benefit of counsel in cross-examination. The Court gave as the basis of this ruling the rules set forth in the *Jencks* decision, 353 U. S. 657. It held further that the rules of the *Jencks* case were applicable to administrative hearings as well as criminal trials. Whether or not the doctrine of that case should be extended to administrative hearings is not now before us.

The *Jencks* case involved written and oral reports of witnesses made over a period of time contemporaneously with the happening of events about which they testified. The witnesses who testified on behalf of the Labor Board in the hearing before the Trial Examiner made no such reports.

Witness Adell Metcalfe testified on cross-examination that he gave a statement to a Mr. Gieser. Counsel for the petitioner did not pursue the matter and made no demand for the production of the document. (p. 188 Official Report of Proceedings.) Kenneth Barlow testified (p. 183 Official Report of Proceedings), that he gave a signed statement to either Mr. Griesbach or Mr. Gieser. Counsel for petitioner asked the witness several questions as to whether or not his testimony was the same as the statements. He made no request for production.

The Official Report of the Proceedings does not show that any other witness made a pre-trial statement.

During the cross-examination of George Edward Reed counsel for the Board held a paper in his hand. Counsel for the petitioner took this to be a statement of the witness and made a demand for it. It developed from the witness himself that he had not signed a statement.

In *National Labor Relations Board v. Adhesive Products Corporation, supra,* counsel made demand for pro-

duction when it developed that there was a statement. After this decision the Board amended section 102.95 of its regulations by adding: "Provided, after a witness called by the general counsel, has testified in a hearing upon a complaint under section 10 (c) of the act the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken." While this amendment to the regulation was not in effect at the time of the hearing before the Trial Examiner it provides the usual and orderly procedure for the production of such a statement.

In *Hickman v. Taylor*, 329 U. S. 495, decided under the discovery rules of the Federal Rules of Civil Procedure, the Court did not require counsel to submit to his adversary pre-trial statements of his witnesses. The Court said at p. 514:

> "But until some rule or statute definitely prescribes otherwise, *we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right*. When Rule 20 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result." (Emphasis added.)

Administrative hearings of the Labor Board are governed by the Administrative Procedure Act rather than the Federal Rules of Civil Procedure. Section 1001 et

seq., Title 5 U. S. C. The usual and ordinary rules of evidence applicable in the district courts so far as practicable govern its hearings. Title 29 U. S. C. Section 160 (b).

As stated above statements of two witnesses for the Board were revealed by cross-examination. Counsel for the Petitioner was not entitled to these statements prior to the hearing under the Federal Rules of Civil Procedure, any applicable rules of evidence or any regulation of the Board in effect at the time of the hearing. When it developed that there were statements counsel should have moved for their production. He would then have squarely presented the question as to his right to have them. Not having made such a motion, he waived any right or privilege he may have had for their inspection.

At the commencement of the hearing the petitioner moved to dismiss paragraph six of the complaint on the ground that the allegations therein were not supported by timely charges.

There was an original, first amended, second amended and third amended charge filed. Each of these charges in addition to stating with particularity unfair labor practices in the discharge of certain employees alleged: "By the acts set forth in the paragraph above and by other acts and conduct, it, by its officers, agents and representatives, has interfered with, restrained, and coerced and is interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act."

The test of the sufficiency of the charge to support the complaint is set forth in *National Labor Relations Board v. Kohler Company*, 220 F. 2d 3, C. A. 7.

> "There must be some relationship between charge and complaint, however. Section 10 (b) makes the filing of a complaint contingent upon the existence of

a charge, and it has been consistently held that the Board cannot initiate a complaint on its own motion. N. L. R. B. v. National Licorice Co., 2 Cir., 104 F. 2d 655, affirmed 309 U. S. 350, 60 S. Ct. 569, 84 L. Ed. 799. So long as the Board entered the controversy pursuant to a formal charge, it may allege whatever it finds to be a part of that controversy. But if it gets so completely outside of the situation which gave rise to the charge that it may be said to be initiating the proceeding on its own motion, then the complaint should fall as not supported by the charge."

Applying this test we conclude that the allegations of the charge and the first, second and third amended charges are sufficient to support the claims of unfair labor practices contained in the sixth paragraph of the complaint.

See also *Consumers Power Co. v. National Labor Relations Board,* 113 F. 2d 38 at 42, C. A. 6; *Stokely Foods, Inc. v. National Labor Relations Board,* 193 F. 2d 736, C. A. 5; *National Labor Relations Board v. Raymond Pearson, Inc.,* 243 F. 2d 456, C. A. 5.

The petitioner claims that the testimony as taken before the Trial Examiner was not complete in the Official Report of Proceedings and that therefore the panel of the Board did not review the entire record.

A careful examination of the record does not indicate that it is defective. It appears to be complete, it has continuity and there is no indication of any omissions.

Petitioner attempts to show these omissions by the affidavits of three witnesses who say that they answered "no" to a long list of statements or questions attached to the exceptions to the Trial Examiner's intermediate report and marked Exhibit A. The record shows that each of these witnesses was asked rebuttal questions and that many of the questions on the list were asked of the

witnesses. Apparently there was no effort to check this deficiency with the reporter or to have it corrected if it were found to be incomplete. We are of the opinion that the petitioner has failed to substantiate his claim that the record is defective.

The Board in its decision according to note 2 did not affirm any findings of the Trial Examiner that were affected by these alleged denials. Without attempting to determine whether or not such testimony was given the Board gave full credit to it as though it had been given. The Board committed no error in this respect.

Our examination of the record does not disclose any prejudicial bias or hostility on the part of the Trial Examiner. He was courteous to the lawyers, impartial in his rulings and carefully excluded impertinent testimony. He gave counsel for the petitioner ample opportunity to present his case and we cannot say that he denied the petitioner the right to introduce any competent evidence.

The other objections to the Board's decision present purely factual questions.

Section 160 (e) Title 29 U. S. C. provides, "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

The Trial Examiner in his findings carefully revicwed the testimony and there is evidence of a substantial nature to support his findings which were adopted by the Board. There are of course conflicts in the testimony but as long as there is substantial evidence on a point in dispute this Court will not disturb the findings of the Board.

In our opinion the Board's findings of fact support its conclusions as to the violations of the Act and its decision and order will therefore be

Affirmed.

The Board's request for enforcement of its order against the petitioner is allowed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed March 29, 1960.)

This cause came on to be heard on petition of The Raser Tanning Company, for review of an order and decision of the National Labor Relations Board, and upon the answer and request of the National Labor Relations Board for an order of enforcement of its order.

It was submitted to the Court upon the petition and the answer of the parties, the transcript of the record from the National Labor Relations Board, and briefs and oral arguments of counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the decision of the National Labor Relations Board be affirmed.

And it is further ordered that the order of the National Labor Relations Board be enforced.

/s/ LESTER L. CECIL,

United States Circuit Judge.

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No. 936

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JUN 7 1960
JAMES R. BROWNING, C

In the Supreme Court of the United States

OCTOBER TERM, 1959

THE RASER TANNING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):	
Section 8(a)(1)	5, 6
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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 34) is reported at 276 F. 2d 80. The Board's Decision and Order (267a-273a)[1] are reported at 122 NLRB 640.

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1960 (Pet. 41). The petition for a writ of certiorari was filed on May 13, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] References followed by the letter "a" are to the appendix to petitioner's brief in the court below; references followed by "b" are to the appendix to the Board's brief below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's findings that petitioner, in order to defeat a union campaign, engaged in surveillance, interrogation, threats, and promises of benefit, and that it discharged seven employees in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

2. Whether there were procedural irregularities in the Board proceedings.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2-4 of the Petition.

STATEMENT

A. *The Board's Findings of Fact*

In the course of its organizational campaign in April of 1957, the Union [2] held two meetings in a church to which many of petitioner's employees belonged (253a; 16a-17a, 6b, 84a). Petitioner learned of the union activity the day after the first meeting (183a-184a). Its president, vice-president, superintendent, and secretary thereupon compiled a list of employees they expected would support the Union; and, as the secretary admitted, they "started by putting down all the colored fellows * * * because of the activity they were having at the * * * church" (184a).

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[2] Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO.

The employees who came to the second union meeting saw a car drive slowly back and forth in front of the church. Inside the car were petitioner's vice-president, superintendent, and secretary, who made notes, apparently of license plate numbers, as they passed the parked cars of their employees. The following morning, the same company officials were seen in the employees' parking lot, checking the backs of the cars against a piece of paper they were carrying (254a; 6b-8b, 10b-18b, 27b-28b, 38b, 46b-47b, 60b-61b).

Later that same morning, petitioner's vice-president remarked to one of the employees, "I see you were late for the union meeting" (254a; 15b). Petitioner's superintendent asked another employee, Kenneth Barlow, whether he had been at the union meeting. Upon receiving an affirmative reply, he remarked, "We knew that you were because we have your license number," and showed Barlow a list of license numbers, pointing out his and his brother Jack's (253a; 28b).

About a week later, shortly before the Board conducted a representation election at the plant, petitioner's superintendent told Kenneth Barlow that the Company would do all in its power to keep the Union out, and, if the Union did succeed, employees who had had anything to do with it would be sorry (255a; 29b). A few days later, Barlow told the superintendent that he was "finished with the Union" (255a; 25b, 30b).

Barlow was then asked to repeat his recantation in the presence of petitioner's president, vice-president, and secretary (255a; 30b). Petitioner's president told Barlow that anyone could make a mistake and that he would forget it if Barlow were really through with

the Union, and that Barlow would get a higher paying job after the election if the Union lost (255a; 30b). Thereafter, Barlow, on the request of petitioner's superintendent, telephoned him when the next union meeting was to be held at the church. Although petitioner's vice-president and superintendent found no meeting there at the appointed time, the superintendent, on the instructions of petitioner's president, gave Barlow a dollar "for the phone call" (255a; 55a-57a).

A third union meeting was held at the Steelworkers' Hall on April 30, the night before the representation election (253a-254a; 22b, 29b). On the following morning, petitioner's superintendent asked Kenneth Barlow if he had attended this union meeting in spite of his earlier declaration that he was "finished with the Union." Barlow denied that he had attended, and the superintendent showed him a list, stating, "Well, we have a list of names here of the guys that were at the union meeting last night. Your name and Jim Trent's is on the top * * *" (254a; 31b).

When Barlow asked how they knew who was at the meeting, the superintendent replied, "We had several of the boys up there" (254a; 31b). He told Barlow that the only way to make his job secure would be to abstain from voting in the representation election that day (256a; 31b). Immediately preceding the election, Kenneth Barlow's brother, Jack, was asked by a foreman whether he was as strong for the Union as his brother. When Jack answered in the affirmative, the foreman said, "Well, that's too bad" (262a; 34b-36b, 39b-42b).

Both Barlows voted, despite these warnings, and a week after the election they were summarily and simultaneously assigned to work at the Hide House, where petitioner sent employees for disciplinary purposes because the work there was the most disagreeable and the pay the lowest (259a; 2b, 34b, 51a-52a, 172a-174a, 54b, 57b, 63b). The next day, petitioner's superintendent told them to pick up their checks because they were being laid off (262a; 34b-36b, 39b-42b).

Some months later, when Jack Barlow reapplied for work, petitioner's superintendent told him that he would not be hired because of "the way your brother carried on with the union" (262a; 43b-44b). The superintendent then asked Jack whether he had voted for the Union, and, when Barlow replied that he had and would do so again, he was told that he would not get the chance "because they won't hire you back" (262a; 44b).

In addition to the Barlow brothers, petitioner discharged five other employees. Like the Barlows, they were active union adherents who, prior to their discharge, had records of several years of steady and satisfactory service at petitioner's plant. And, as with the Barlows, the circumstances of their discharges made it plain that the reason was their union activity (256a, 257a, 259a, 260a, 270a; 16a-17a, 84a, 3b-5b, 10b, 20b, 25b, 45b-46b, 47b, 49b, 53b).

B. *The Board's Conclusions and Order*

On the basis of this evidence, the Board found that petitioner violated Section 8(a)(1) by its surveillance of union meetings, and by the interrogation, threats,

and promises of benefit addressed to employee Kenneth Barlow and others (254a, 256a, 268a). The Board further found that petitioner violated Section 8(a)(3) and (1) by its discharge of the seven employees in question (263a, 268a, 270a).

The Board's order requires petitioner to cease and desist from violating Section 8(a)(1) and (3), to reinstate with back pay the seven dischargees, and to post appropriate notices (270a-272a).

C. *The Decision of the Court of Appeals*

The court below upheld the Board's unfair labor practice findings as adequately supported by the record and found no irregularities in the Board's procedure. It accordingly enforced the Board's order in full (Pet. 41).

ARGUMENT

1. Petitioner's substantive contention is that the Board "has failed to sustain its burden of showing violations of the Act by substantial evidence" (Pet. 22). The court below, after noting that the "Trial Examiner in his findings carefully reviewed the testimony," concluded that "there is evidence of a substantial nature to support his findings which were adopted by the Board" (Pet. 40). In these circumstances, no issue warranting further review by this Court is presented. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the facts summarized in the Statement demonstrate that there is ample support for the Board's unfair labor practice findings. Petitioner's contrary contention appears to rest principally upon alleged er-

rors in the Trial Examiner's determinations as to credibility (Pet. 24-25). These determinations, made by the "experienced examiner who has observed the witnesses and lived with the case" (*Universal Camera Corp.*, 340 U.S. at 496), will not be disturbed on review in the absence of a showing of gross error. No such showing can be made in this case.

2. Equally insubstantial is petitioner's further contention that it was denied a fair hearing because the Trial Examiner demonstrated "bias and open hostility" (Pet. 13). As the court below concluded (Pet. 40):

> Our examination of the record does not disclose any prejudicial bias or hostility on the part of the Trial Examiner. He was courteous to the lawyers, impartial in his rulings and carefully excluded impertinent testimony. He gave counsel for the petitioner ample opportunity to present his case and we cannot say that he denied the petitioner the right to introduce any competent evidence.

This conclusion is not impaired by the three incidents referred to by petitioner (Pet. 16-21), on their face they fall far short of establishing bias. Cf. *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43-44. Nor is prejudice in this case established by what the same Examiner may have done in some other cases. And even if, as petitioner charges, the Examiner had " 'uniformly credited the Board's witnesses and as uniformly discredited those of * * * [petitioner] * * * [this] would not furnish a basis for a finding * * * [of] bias or partiality * * * ' " *National Labor Relations Board* v. *Pitts-*

burgh Steamship Co., 337 U.S. 656, 659-660, quoting from *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800 (C.A. 5).

3. Finally, there is no substance to petitioner's contention that it was improperly denied the right to inspect the prehearing statements of the General Counsel's witnesses (Pet. 10-12). Only two witnesses testified to having made prehearing statements to the General Counsel (Pet. 36); and, as the court below found, the failure of company counsel to move, after they so testified, for the production of these statements "waived any right or privilege he may have had for their inspection" (Pet. 38). Nor can such a request be deemed to have been made by the subpenas which petitioner requested at the outset of the hearing calling for "all statements, affidavits and other written matter developed by or received by the Charging Union or the General Counsel with respect to all items of the Complaint and all of the material during the investigation leading up to the issuance of the Complaint" (Pet. 35). These subpenas were properly quashed by the Examiner, for, as the court below observed (Pet. 35), "The request is so broad that it is meaningless." In any event, the failure of petitioner to raise the issue of the prehearing statements in its exceptions to the Examiner's report [3] precludes it from arguing the point now.

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[3] Petitioner's failure to file exceptions on this point is not excused by the fact that the Board was then of the view that the *Jencks* rule did not apply to Board proceedings. The Board's decision in *Ra-Rich Mfg. Corp.*, 121 NLRB 700, reversing this position, was issued several months before the decision herein. Moreover, when it filed exceptions, petitioner was already on notice that the Second Circuit, in *National Labor Relations Board* v. *Adhesive*

Section 10(e) of the Act; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Solicitor General.

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June, 1960.

Products Corp., 258 F. 2d 403, had held that the *Jencks* rule applied to Board proceedings. Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37; *National Labor Relations Board* v. *Pinkerton's National Detective Agency*, 202 F. 2d 230, 233 (C.A. 9).

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